U.S. Department of Justice

United States Attorney
Southern District of New York

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October 12, 2017

BY ECF

Honorable P. Kevin Castel
United States District Judge
Southern District of New York
500 Pearl Street, Suite 1320
New York, New York 10007

Re: *United States v. Thomas C. Davis,* 16 Cr. 338 (PKC)

Dear Judge Castel,

Thomas C. Davis ("Davis") is scheduled to be sentenced on October 19, 2017 at 2:00 p.m. The Government respectfully submits this letter to advise the Court of the pertinent facts concerning the assistance that Davis rendered in the investigation and prosecution of William T. Walters, a/k/a "Billy." In light of these facts, the Government intends to move at sentencing, pursuant to Section 5K1.1 of the Sentencing Guidelines and 18 U.S.C. § 3553(e), to request that the Court sentence Davis in light of the factors set forth in Section 5K1.1(a)(1)(B)(5) of the Guidelines.

A. Overview

As Your Honor is aware, this case involved a long-term, incredibly profitable insider trading scheme, which was straightforward in its simplicity. Walters was a wealthy Las Vegas gambler and businessman who exploited his relationship with Davis, who sat on the Board of Directors of Dean Foods, so that Walters could gain access to material, non-public information ("MNPI") about Dean Foods' earnings and corporate announcements. Davis provided this inside information to Walters for years, and Walters, in turn, made profitable trading decisions that benefitted him by approximately $45 million dollars in profits gained and losses avoided. In return for providing this inside information, Davis received various benefits from Walters, ranging from two separate loans for approximately $1 million (that were never fully paid back), to investments in Davis's business ventures, to the desired status benefits of having a friendship with a quasi-celebrity. Davis received no share of the trading profits.

When FBI agents first approached both Walters and Davis about the scheme, in 2014, both denied their involvement. Davis also turned down the FBI's request to assist in the investigation.

The investigation quieted until May of 2015, when Davis sat for a deposition with the Securities and Exchange Commission (the "SEC"), which was conducting a parallel investigation into Walters' trading, including in Dean Foods stock. During this deposition, Davis continued to deny his involvement in the insider trading scheme, and made a number of additional false statements about his financial condition and actions he had taken as a result of his financial troubles. Following Davis's deposition, the Government's investigation gained steam and included investigative steps surrounding Davis's personal and professional life. In early 2016, new counsel for Davis approached the U.S. Attorney's Office to inquire about the possibility of Davis cooperating. During his very first meeting with the Government, Davis candidly told the Government that he had been providing Walters' inside information on Dean Foods for so long that he couldn't remember exactly when the conspiracy began. He revealed specifics of conversations he could remember clearly, and he told the Government about receiving a prepaid, burner phone from Walters, which Walters instructed him to use when discussing Dean Foods, and code words to use during those conversations in case anyone was listening to the calls. Davis also told the Government that, after the FBI had approached him in May of 2014, he got scared and threw this burner phone into Turtle Creek, a body of water near his home.

Davis met with the Government approximately ten times in the spring of 2016. The information he provided during those meetings, along with the substantial assistance he provided in the months leading up to trial and at trial itself, as described in much greater detail below, was invaluable to the Government's investigation and thus the prosecution of Walters' insider trading in Dean Foods and Darden Restaurants, Inc. ("Darden").

B. Background

Personal History

Davis is a 68-year-old U.S. citizen who lives in Dallas, Texas. He has been married three times, and has one daughter, step-children from two marriages, and three grandchildren. Davis is currently in the middle of a divorce from Terie Davis, to whom he has been married since approximately 2007. Mrs. Davis formally separated from Davis following Davis's guilty plea in this case.

After Davis graduated from Georgia Tech, he joined the Navy. He served in the military until approximately 1974, at which point he requested and received an early discharge (six months before his obligation ended), allowing him to attend Harvard Business School. Davis, at the time married to his first wife, moved to Boston. Following his graduation in 1976, Davis took a position as an investment banker with Houston-based Rotan Mosle, Inc. ("Rotan Mosle"), and he and his then-wife moved back to Texas. In 1984, he opened the Dallas office of the investment bank Donaldson, Lufkin & Jenrette ("DLJ"), where he remained employed until approximately 2001.

Approximately a year before he left Rotan Mosle, Davis began seeing Louise Letha, a woman with whom he worked. He separated from his first wife shortly thereafter, and they divorced in 1985 or 1986. Davis married Letha in 1987 or 1988. During Davis's marriage to Letha, he assumed primary custody of his daughter, which he retained until she went to college.

While at DLJ, Davis made anywhere from approximately $1 to $2 million per year. In approximately 2001, DLJ was purchased by Credit Suisse, through which transaction Davis received approximately $10 million and retired. He was invited by his friend and business associate, Gregg Engles, the CEO of Dean Foods, to join the Dean Foods Board in approximately March 2001. Engles believed Davis's knowledge of, and experience with, capital markets would be an asset to the Board.

Shortly before Credit Suisse purchased DLJ, Davis met and began seeing Terie Davis, an aesthetician at a spa in Dallas. In or about 2004, Davis and Letha divorced. Although he did not realize it at the time, this divorce proved to be financially disastrous for Davis; he continued to live an extravagant lifestyle for the years following his divorce—but with half of the assets, limited liquidity, and a much more limited income (indeed, Davis's primary source of income from 2001 to 2010 was from his board positions, of which Dean Foods was the most lucrative.)[1] Davis saw Terie on and off for a number of years, and the two married in 2007. Davis and his new wife continued to live extravagantly in Dallas, taking high-priced luxury vacations and driving luxury cars. Indeed, Davis consistently spent well beyond his means, which ultimately caused him to seek and obtain two separate loans from Billy Walters. These loans were provided (and essentially forgiven until the investigation was revealed) by Walters as a benefit in return for Davis regularly providing inside information to Walters.

Davis and Walters first met in the mid-1990s during a golf tournament; from there, they developed a friendship that initially centered around mutual interests in sports, business, and golf. At least as early as 2007, they began discussing the possibility of engaging in joint business ventures, although none would come to fruition until 2011. Their personal relationship also strengthened in the fall of 2007 when the death of Terie Davis' son drew the couples closer.

The Offense Conduct

Walters knew that Davis served on the Board of Dean Foods. Davis recalls learning from Walters that Walters owned Dean Foods stock, although he does not recall specifically when or how he learned this. (Throughout the life of the conspiracy, Walters never told Davis how much stock he owned, although Davis recalls that he knew Walters had a large investment in the summer of 2012; indeed, Davis was surprised when he learned the volume and magnitude of Walters' trading.) After learning this information, and from 2008 until early 2010, Walters would ask Davis on occasion how the "milk business" was doing, and Davis made an effort to keep Walters abreast of any developments in Dean Foods. On at least five occasions during this time period (spring 2008, June 2008, fall 2008, February 2009, and May 2009), Davis passed Walters MNPI that Walters used to make trading decisions. Davis stated that he provided Walters with this information because he believed that it would inure to Davis's benefit at some later point. Davis also benefited from the scheme in that he reveled in the caché of his friendship with Walters, and being able to claim the world-renowned gambler as a friend.

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[1] Along with Dean Foods, Davis has served on the board of Affirmative Insurance (beginning in 2003), Westwood Holdings (2004), WhiteHorse Finance (2014), and Alphatec Spine (2014). He was also on the board of Trident Energy in the late 1990s.

With respect to the financial benefits, Walters presented Davis with at least three business opportunities from 2007 through 2009, although Davis did not participate in any of them. Davis stated that he believed that by providing Walters with information about Dean Foods, Walters would in turn provide him with financial benefits, including investment opportunities and other sources of capital.

By April 2010, Davis was in dire financial straits, and he did not have enough cash on hand or available to him to pay his debts. As he acknowledged to the Government in proffers and to the Court on the witness stand, Davis knew that he could not go to a bank to get a loan, but he believed that Walters would extend him a loan without asking too many questions. He was right. Walters quickly arranged for $625,000 to be loaned to Davis by an associate of Walters' named Luther James, whom Davis had never met. From April 2010 until April 2011, Davis made five interest payments to James for a total of $30,581.93. In April 2011, Davis and James renegotiated the loan to extend the term from April 2011 to November 2011. Davis made no interest payments during this period, and when it became apparent that Davis was not in a position to pay off his debt, Walters assumed responsibility for the loan from James in January 2012. After Walters assumed the loan in or about January 2012, Davis did not make a single payment until June 2014, shortly after the FBI first approached him in connection with this investigation.

This loan, however, did not solve Davis's financial problems. In March 2011, after he had depleted all of the funds from the April 2010 loan from Walters, Davis lost $200,000 gambling on credit at the Cosmopolitan hotel casino in Las Vegas. When the Cosmopolitan called in the remaining $100,000 of his marker in August 2011, Davis did not have enough money in his bank account to cover the wire transfer. In order to cover his negative balance, Davis improperly and illegally caused $100,000 to be wired from the bank account of Shelter Golf, a non-profit entity that he oversaw, to his personal bank account in order to rectify his negative balance. In November 2011, after he was unable to generate cash by selling stock that remained restricted, Davis obtained a line of credit from Walters in the amount of $400,000. Davis immediately drew down $300,000, of which he used $100,000 to repay Shelter Golf for the money he took in August to cover the Cosmopolitan wire transfer. To this date, Davis has never paid interest or principal to Walters on this second loan.[2] Throughout this time period, Davis continued to live a lavish lifestyle, including luxury travel, memberships at private clubs, and gambling tens, if not hundreds, of thousands of dollars in Las Vegas.

As Davis testified at trial, and consistent with what Davis stated in proffer sessions with the Government, after he received the first loan from Walters in 2010, Walters began to ask more directly—and more often—for specific information about Dean Foods. Davis stated that he felt indebted to Walters as a result of the favorable loan and felt obligated to regularly update Walters with more specific information on a more frequent basis. In fact, at the very meeting in Las Vegas on April 9, 2010, when Davis personally asked Walters for the loan, Davis also informed Walters that Dean Foods had hired investment bankers for the first time to evaluate the possibility of a spinoff of its lucrative WhiteWave brand, which was not public information. Walters purchased a large block of Dean Foods stock three days later. Several weeks later, however, in early May, Davis learned from Dean Foods CEO Gregg Engles that first quarter earnings would be far below expectations and that the outlook for the company was worse than anticipated. Soon after learning this information, Davis called Walters to inform Walters of the poor earnings results and disappointing outlook for the company. On the next two trading days, Walters sold all of his Dean Foods stock, avoiding losses of more than $7 million. Similarly, Davis also specifically recalls providing Walters with MNPI in October 2010, May 2012, July 2012, September through October 2012, and January 2013, which Walters used to make substantial (and profitable) trades in Dean Foods.

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[2] In the summer of 2015, in consultation with lawyers representing them in connection with this investigation, Walters and Davis consolidated the two loans into one note. The total amount of the consolidated loan is approximately $845,000, which remains outstanding, and which the Government seeks to forfeit from Davis as his profits from the scheme. The Government will provide the Court with a proposed order of forfeiture in advance of sentencing.

At some point after Walters provided Davis with the first loan in April 2010, Walters gave Davis a prepaid cellphone in a box, which Davis coined the "Batphone." Walters told Davis that they should use this phone to discuss Dean Foods. Davis asked him if he believed that their calls were being recorded, and Walters responded that he did not think so but that it was safer this way just in case they were being recorded. Walters also told Davis that, when using the phone to discuss sensitive topics, they should refer to Dean Foods as the "Dallas Cowboys." Davis used the phone to communicate with Walters throughout the summer of 2012, but he would use it only from his car or in his home; if he was somewhere else (like a golf club or a museum), he would use his regular phone to call Walters. Davis also explained that Walters typically would call (or text) him and say "let's have a cup of coffee," which was the code for Davis to use the Batphone to call Walters back either on Walters' cellphone or on another number provided by Walters.

C. Davis's Criminal Conduct

The Current Offenses

As described above and as Davis testified to at trial, Davis participated in a conspiracy to commit securities fraud and wire fraud, from at least 2008 through 2014, during which he provided Walters with material non-public information about Dean Foods and Darden. Additionally, Davis falsely maintained his innocence until February of 2016. When he was approached by the FBI in May 2014 and questioned about his relationship with Walters, Davis denied that he provided Walters with inside information. Shortly thereafter, Davis threw the Batphone in a creek near his home in Dallas, thereby destroying evidence of the conspiracy. Davis sat for a deposition with the SEC in May 2015 and, under oath, falsely denied his involvement in the conspiracy.[3]

In addition to the criminal conduct directly associated with this scheme, Davis filed fraudulent tax returns on behalf of himself and Shelter Golf, the non-profit organization for which he was a co-president of the Board of Trustees. As described above, in August 2011, he caused the Shelter Golf bank account, which he controlled, to transfer $100,000 to his personal bank account for his personal use. In November 2011, Davis re-paid the $100,000 back to Shelter Golf. When Shelter Golf filed its 2011 tax returns, which Davis signed, Shelter Golf did not reveal this self-dealing transaction, nor did the tax returns acknowledge that this money was impermissibly sent to a disqualified person. In his personal income tax returns for 2011, Davis did not account for the interest he received on the $100,000 during the two-plus months between the time he received the money and when he repaid it.

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[3] Walters was also subpoenaed for an SEC deposition; he invoked his 5th Amendment rights against self-incrimination and declined to testify.

In addition, in 2012, Davis wrote, or caused to be written, two separate checks for $25,000 from Shelter Golf to his personal bank account. Of this $50,000, approximately $20,000 was properly considered to be repayment to Davis for legitimate Shelter Golf expenses he had incurred and paid for out of his personal funds. Davis kept the remaining approximately $30,000. In August 2015, Davis filed 2012 tax returns for Shelter Golf and included deductions for so-called business expenses that were actually personal expenses unrelated to Shelter Golf. As part of his cooperation, Davis filed corrected tax returns and repaid Shelter Golf.

Criminal History and Other Bad Acts

Other than the crimes described above, Davis's criminal history is limited to two arrests for driving under the influence of alcohol, one in May 1984 and the other in March 1986. Neither arrest resulted in a conviction and appear to have been dismissed. (Davis's recollection corroborates this; he cannot recall why they were dismissed.)

When Davis's daughter and step-children were young, Davis wrote each of them a check for $10,000, and wrote the money off as a gift on his personal taxes that year. Davis, however, never actually gave the check to one child, but claimed it on his taxes nonetheless. Davis believes this was in 1991 or 1992. (The Government only knows about this because of Davis's candor while meeting with the Government.)

Davis is a gambler. Davis's first foray into gambling was in college, when he and other members of his fraternity would gamble on sports. Although he did not gamble while he was in the military, he began gambling again in earnest—primarily on sports—after he graduated from business school, and had an income. Davis continued to engage in sports gambling, and began to take regular trips to Vegas. Davis recalls one instance in the late 80's or early 90's where he lost approximately $20,000 at the Desert Inn—a friend then gave him a $10,000 line of credit, and Davis won it all back. Over the years, he has won and lost hundreds of thousands of dollars in Las Vegas. He also bet on sports in Dallas, typically through a bookie. At times, Davis has collected bets for other individuals in Dallas and placed their bets with his bookie.

Davis also told the Government during proffer sessions that he paid for sex on a number of occasions. The first time Davis solicited a prostitute was when he was still married to his second wife; he told the Government that he could not recall the last time he did, but believes it was after he had begun seeing his then-wife, Terie. During the lead up to trial, however, and after Davis's wife filed for divorce, Davis told the Government—in tension with what he had said earlier—that he had not paid for sex while he was with Terie. While on the stand, Davis was confronted with phone records showing frequent and repeated calls to escort services. While Davis had told the Government about using escort services while proffering, he minimized his use of these types of services and did not reveal the extent to which he used them. The Government took Davis at his word on this collateral matter and did not learn of the frequency of his calls to these types of services until Davis was on the stand.

While on the stand, Davis was also confronted with documents showing that he had falsely claimed that he was employed by a company that he was not actually employed by for the purpose of maintaining health insurance, which he had not previously revealed to the Government. While Davis could not testify on the stand as to whether or not this legally amounted to health care fraud, Davis has acknowledged that his conduct was wrong, and explained that his then-wife was having a health issue at the time and that he did what he, at the time, believed was necessary in order to get his wife the diagnostic tests she needed.

D. Davis's Cooperation

As described above, Davis maintained his innocence until early 2016. Davis ultimately decided to cooperate for a number of reasons. First, Davis suffered a series of serious health scares in the fall of 2015, as described in detail in the defendant's submission. These scares gave Davis perspective when considering how he wanted to live the remaining years of his life, and helped him decide to take responsibility for his conduct. Second, the persistence and increasing intensity of the Government investigation made him realize the issue would not go away. And third, the growing realization of the massive size of the positions Walters took motivated Davis to explain that he had not truly understood the full scope of Walters' trading. As the Court is likely aware, the cooperation process is a difficult one, and requires an individual to not only disclose the criminal conduct the Government is investigating, but to go through his or her entire background in painstaking detail. From the time he decided to cooperate with the Government all the way through the conclusion of Walters' trial, Davis was completely committed to the process, and provided invaluable corroboration for the Government's strong circumstantial case.

In the beginning, the Government was only able to meet with Davis for a few hours at a time in order to accommodate his health condition. This meant that there were numerous meetings, day after day, in which Davis explained his relationship with Walters and everything he could recall about passing Walters inside information. While Davis at times had trouble remembering exact dates or, at times, specific conversations, he took responsibility for the full scope of his criminal conduct in the very first meeting. During that first meeting, Davis told the Government about the specific calls he remembered in the spring of 2012, about the money he owed Walters, and about the burner phone Walters had given him. Davis also spent time reviewing documents which, at times, helped refresh his recollection about conversations that, in some instances, occurred eight years prior. The documents did not always refresh his recollection, however, which gave the Government added assurance that Davis was committed to being truthful about what he remembered about the conspiracy—including the specifics of certain conversations, which the Government would not have known but for Davis's cooperation.

Davis also willingly turned over his iPad and cellphone, which allowed the Government to identify the telephone number associated with a burner phone—the "phone in the box"—that Walters himself used to call Davis beginning in the fall of 2011 and throughout the critical summer of 2012. Identifying that number led the Government to develop devastating evidence about Walters' use of prepaid phones with Davis in connection with his trading in Dean Foods—evidence that the Government likely would never have found if not for Davis's cooperation.

Along with Davis's original proffer sessions in the spring of 2016, Davis spent an extraordinary amount of time with the Government preparing for trial. Davis's testimony at trial covered events beginning in the mid-90's, and specific conduct that occurred close to a decade before he testified. While spending days at a time with the Government preparing for trial, Davis resigned from all boards of directors, and his third wife, Terie, announced that she was seeking a divorce. The experience was incredibly difficult for Davis and took a toll both emotionally and physically.

Davis testified at Walters' trial over the course of five days. As Your Honor will recall, he was subject to vigorous cross-examination and a defense that essentially centered around the assertion that he was a liar. Davis's personal shortcomings and embarrassing indiscretions were exposed in a very public way. Nonetheless, Davis testified day after day about his own criminal conduct and his criminal conspiracy with Walters, providing incredibly strong corroboration of the documentary evidence of the insider trading scheme. While the circumstantial proof against Walters was devastating, Davis's testimony was powerful evidence of Walters' guilt, and provided the jury with insight into not only how the conspiracy worked, but how it came to be. Moreover, some of the Government's strongest circumstantial proof of Walters' guilt—particularly Walters' "phone in the box"—was discovered and available only because of Davis's cooperation. The Government believes that Davis's cooperation and testimony was significant to the jury's determination that Walters was guilty of every count with which he was charged.

E. Procedural History

Davis pled guilty, pursuant to a cooperation agreement, on May 18, 2016, to (i) one count of conspiracy to commit securities fraud, in violation of 18 U.S.C. § 371; (ii) one count of conspiracy to commit wire fraud, in violation of 18 U.S.C. § 1349; (iii-vi) four counts of securities fraud, in violation of 15 U.S.C. §§ 78j(b) & 78ff and Title 17, Code of Federal Regulations, Section 240.10b-5; (vii-x) four counts of wire fraud, in violation of 18 U.S.C. § 1343; (xi) one count of obstruction of justice, in violation of 18 U.S.C. § 1512(c) in connection with his May 2014 lies to the FBI and the resulting attempt to destroy the Batphone; and (xii) one count of perjury, in violation of 18 U.S.C. § 1621, in connection with his lies to the SEC.

As a part of the agreement with the Government, Davis agreed that, at least two weeks prior to the date of sentencing, he would file (i) amended Tax Exempt Organization Income Tax Returns, Forms 990, for the tax years 2011, 2012 and 2015 for Shelter Golf (ii) an amended U.S. Individual Income Tax Return, Form 1040 ("Form 1040"), for himself for the tax year 2011; and (iii) a Form 1040 for himself for the 2012 tax year. He also agreed that he would pay all taxes due and owing to the Internal Revenue Service as a result of the filings, and will also pay all applicable penalties imposed by the IRS. Defense counsel has represented to the Government that Davis has met all of the filing obligations within his control, and has made available to Shelter Golf the information needed to address its filing obligations.

Davis also agreed to make restitution in an amount to be specified by the Court in accordance with 18 U.S.C. §§ 3663, 3663A, and 3664. This amount shall be paid according to a plan established by the Court. It is the Government's position that Davis should be held jointly and severally liable with Walters for restitution to Dean Foods and Barington Capital Group.

With respect to forfeiture, Davis admitted the forfeiture allegation with respect to Counts One through Ten of the Information and agreed to forfeit to the United States, pursuant to Title 18, United States Code, Section 981, and Title 28, United States Code, Section 2461, all property, real and personal, that constitutes or is derived from Davis's proceeds traceable to the commission of the offenses, including, but not limited to, outstanding loans that were received as part of the scheme and which were never repaid. He further agreed that any forfeiture of Davis's assets shall not be treated as satisfaction of any fine, restitution, cost of imprisonment, or any other penalty the Court may impose upon him in addition to forfeiture. The Government will submit a proposed forfeiture order to the Court in advance of sentencing for $845,000, representing the amount of unpaid funds from the loans Walters received from Davis. As the Court is aware, Davis did not receive any share of the profits Walters made from trading on inside information, nor was he aware of the magnitude of Walters' trading and profits.

F. Applicable Law

The Sentencing Guidelines

The advisory Sentencing Guidelines promote the "basic aim" of Congress in enacting the Sentencing Reform Act, namely, "ensuring similar sentences for those who have committed similar crimes in similar ways." *United States* v. *Booker*, 543 U.S. 220, 252 (2005). Thus, the Guidelines are more than "a body of casual advice, to be consulted or overlooked at the whim of a sentencing judge." *United States* v. *Crosby*, 397 F.3d 103, 113 (2d Cir. 2005). The applicable Sentencing Guidelines range "will be a benchmark or a point of reference or departure" when considering a particular sentence to impose. *United States* v. *Rubenstein*, 403 F.3d 93, 98-99 (2d Cir. 2005). In furtherance of that goal, a sentencing court is required to "consider the Guidelines 'sentencing range established for . . . the applicable category of offense committed by the applicable category of defendant,' the pertinent Sentencing Commission policy statements, the need to avoid unwarranted sentencing disparities, and the need to provide restitution to victims." *Booker*, 543 U.S. at 259-60 (citations omitted).

The Section 3553(a) Factors

Along with the Guidelines, the other factors set forth in Section 3553(a) must be considered. Section 3553(a) directs the Court to impose a sentence "sufficient, but not greater than necessary" to comply with the purposes set forth in paragraph two. That sub-paragraph sets forth the purposes as:

(A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;

(B) to afford adequate deterrence to criminal conduct;

> (C) to protect the public from further crimes of the defendant; and
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> (D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner. . . .

Section 3553(a) further directs the Court—in determining the particular sentence to impose—to consider: (1) the nature and circumstances of the offense and the history and characteristics of the defendant; (2) the statutory purposes noted above; (3) the kinds of sentences available; (4) the kinds of sentence and the sentencing range as set forth in the Sentencing Guidelines; (5) the Sentencing Guidelines policy statements; (6) the need to avoid unwarranted sentencing disparities; and (7) the need to provide restitution to any victims of the offense. *See* 18 U.S.C. § 3553(a).

The Second Circuit has instructed that district courts should engage in a three-step sentencing procedure. *See Crosby*, 397 F.3d at 103. First, the Court must determine the applicable Sentencing Guidelines range, and in so doing, "the sentencing judge will be entitled to find all of the facts that the Guidelines make relevant to the determination of a Guidelines sentence and all of the facts relevant to the determination of a non-Guidelines sentence." *Crosby*, 397 F.3d at 112. Second, the Court must consider whether a departure from that Guidelines range is appropriate. *Id*. Third, the Court must consider the Guidelines range, "along with all of the factors listed in section 3553(a)," and determine the sentence to impose, whether it be a Guidelines or non-Guidelines sentence. *Id.* at 113. In so doing, it is entirely proper for a judge to take into consideration his or her "own sense of what is a fair and just sentence under all the circumstances." *United States* v. *Jones*, 460 F.3d 191, 195 (2d Cir. 2006).

Section 5K1.1 Analysis

Section 5K1.1 of the Guidelines sets forth five non-exclusive factors that sentencing courts are encouraged to consider in determining the appropriate sentencing reduction for a defendant who has rendered substantial assistance. *See* U.S.S.G. § 5K1.1(a). The application of each of those factors to Davis's cooperation is set forth below.

1. "[S]ignificance and usefulness" of assistance (§ 5K1.1(a)(1)): In the Government's view, Davis's cooperation was significant in advancing the Government's investigation and his testimony at trial played a critical role in corroborating the Government's circumstantial proof of Walters' guilt. First, during his proffer sessions, Davis provided important background information about Walters, including the evolution of their relationship, and a nuanced explanation of how and why the criminal conspiracy began. Without Davis's cooperation, the Government would not have been able to present a complete story to the jury, nor would it have been able to give the jury a firsthand view of the conversations and interactions between Davis and Walters throughout the insider-trading scheme. In that way, Davis's testimony brought the criminal conspiracy to life, and provided the jury with direct proof of the conspiracy. Indeed, the fact that Walters' main defense at trial was to attack Davis' credibility underscores the impact of his direct testimony. Second, Davis's cooperation led to the discovery of some of the most powerful evidence introduced at trial, including the number and records establishing that Walters

used a "phone-in-the-box" to communicate with Davis beginning in the fall of 2011 and at critical times in the summer of 2012.

Davis also told the Government about another person who had seen the batphone—his then-wife, Terie Davis—which allowed the Government to call Mrs. Davis at trial to provide key corroboration about the existence of the burner phone Walters provided to Davis. Walters' own burner phone use, along with Mrs. Davis's description of the "batphone," no doubt made clear to the jury that Walters was knowingly engaged in a criminal conspiracy. Thus, Davis's cooperation and testimony unquestionably helped lead to Walters' swift conviction.

2. "[T]ruthfulness, completeness, and reliability" of information and testimony (§ 5K1.1(a)(2)): Davis was faced with the difficult task of trying to recall conversations and events that occurred over the past 10 years. At times, Davis would confuse the order of certain events or locations, or was not able to recall certain conversations at all, despite the existence of phone and other records confirming that conversations took place. Despite these difficulties—and indeed, in part because of them—the Government determined that the information provided by Davis was truthful and as complete as it could be. To the extent that the Government had concerns about reliability, it was a function of the passage of time and the natural limitations of human memory—at no point during Davis's cooperation did the Government have a concern that the information he provided about the conspiracy was invented or knowingly false. Rather, the information Davis provided was his best effort, made in good faith, to provide the Government with his accurate recollection of the criminal conspiracy. And almost all of it was corroborated by documentary evidence, most of which Davis had not reviewed before meeting with the Government.

Davis's cooperation was also truthful, complete, and reliable in that he told the Government about bad acts, which, without his cooperation, we would not have known. Take, for example, the "batphone." Without Davis's cooperation, the Government would not have known about the existence of the "batphone" or the code words that Walters asked Davis to use, and it certainly would never have known that Davis destroyed the phone by throwing it in Turtle Creek. Thus, as a result Davis's cooperation, the Government was not only able to provide details to the jury of which it was previously unaware, and Davis ultimately pled guilty to a crime about which the Government would have otherwise never known.

To the extent that Davis was not fully forthcoming about his own personal failings—separate and apart from the criminal conduct to which he pled guilty—the Government believes that this does not diminish the extensive nature of the assistance Davis provided. Davis spent the equivalent of a month meeting with prosecutors and detailing every misstep in his life. He admitted his use of bookies and his financial hardships; he admitted that he had extra-marital affairs and paid for sex; and he admitted that he took money from a charity that he ran, which was a humiliating admission for him. He discussed the dissolution of his marriages, and the death of his stepson—all while sitting in a conference room surrounded by the FBI, prosecutors and attorneys from the SEC. The process—which, to be sure, was entirely a result of Davis's own conduct—was difficult. Additionally, as the Court will recall, defense counsel at trial spent an inordinate amount of time exposing the number of times that Davis called escorts while he was traveling. Although Davis had testified on direct about the fact that he had paid for sex, these questions and revelations appeared to be incredibly embarrassing to Davis and, based on the phone records defense presented at trial, it appears that Davis may have minimized the amount and extent of his interactions with escorts when meeting with the Government. As the Court is aware, this testimony, and this topic as a whole, is collateral to the insider trading conspiracy.

3. “[N]ature and extent” of assistance (§ 5K1.1(a)(3)): The nature and extent of Davis’s cooperation cannot be overstated. Once Davis decided to cooperate, he met with the Government time and again, exhausting his memory regarding his relationship with Walters, his financial hardships, and his involvement with Dean Foods and Darden. He spent hours reviewing minutes of Dean Foods board meetings and, in preparation for trial, met with the Government numerous times to prepare for his testimony. He did this while flying back and forth from Dallas, Texas, on an almost-weekly basis. He also willingly turned over his iPad and cellphone to the Government, which led to crucial evidence of Walters’ guilt that the Government was able to use at trial. He subjected himself to vigorous cross-examination attacking not only his conduct but his character. Davis’s cooperation made the Government’s case against Walters that much stronger, resulting in a conviction after only four hours of deliberation on every count in the Indictment.

4. “[A]ny injury suffered, or any danger or risk of injury to the defendant or [her] family” resulting from assistance (§ 5K1.1(a)(4)): Davis’s physical safety was never in jeopardy. He has endured professional, reputational and personal harm as a result of his cooperation that he may not have suffered if he had simply pled guilty to the crime. To be clear, there is no question that the root cause of any of Davis’s problems was his own pre-cooperation conduct. But the extent of the damage to his personal life was exacerbated through the cooperation process. The process took an emotional toll on both he and his then-wife, who left Davis after he pled guilty but before he testified.

5. “[T]imeliness” of assistance (§ 5K1.1(a)(5)): While Davis attempted to maintain a façade of innocence from May 2014, when he was first approached by the FBI, until the beginning of 2016, his decision to cooperate occurred before he was charged.

CONCLUSION

As a result of the foregoing, the Government has determined that Davis provided substantial assistance in the investigation and prosecution of Billy Walters. The Government therefore expects to request at sentencing that the Court sentence Davis in light of the relevant facts stated above and the factors set forth in Section 5K1.1(a)(1)-(5) of the Sentencing Guidelines and Title 18, United States Code, Section 3553(e).

Respectfully Submitted,

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cc: Counsel for Davis (*via email)*